LIBRARY
SUPREME COURT, U. S.

FILED
FEB 13 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-971

D.C. TRANSIT SYSTEM, INC., *Petitioner*

v.

DEMOCRATIC CENTRAL COMMITTEE OF THE DISTRICT OF COLUMBIA,
BLACK UNITED FRONT,
WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,
Respondents

PETITIONER'S REPLY BRIEF

E. BARRETT PRETTYMAN, JR.
SAMUEL R. BERGER
815 Connecticut Ave., N.W.
Washington, D.C. 20006
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-971

D.C. TRANSIT SYSTEM, INC., *Petitioner*

v.

DEMOCRATIC CENTRAL COMMITTEE OF THE DISTRICT OF COLUMBIA,
BLACK UNITED FRONT,
WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,
Respondents

PETITIONER'S REPLY BRIEF

---

1. Respondent Black United Front asserts that the Court of Appeals' holding was "based upon the particular and unique facts (App. 2a) of this case (App. 148a-149a) and is not a general holding relating to other kinds of assets or to other utilities." "Brief of Respondents, Black United Front in Opposition to Petition for Writ of Certiorari," at 3. Respondent Democratic Central Committee of the District of Columbia relies upon essentially the same contention. "Memorandum of the Democratic Central Committee of the District of Columbia Opposing Certiorari," at 4. However, both the rationale and the impact of

these cases reach far beyond the immediate parties, which is attested to by the *amicus curiae* brief of the American Gas Association in support of the petition for rehearing in the Court of Appeals and the *amici* briefs of the Potomac Electric Power Company and the Washington Gas Light Company in support of the petition for certiorari.

Although the Court of Appeals referred to certain allegedly unique circumstances of this case, its sweeping opinion cannot be narrowly confined. The long-standing Commission rule it struck down—that growth in the value of a utility's land belongs to its investors—is essentially the same rule applied by most, if not all, federal and state utility regulatory agencies. Petition for a Writ of Certiorari, at 18. Moreover, in balancing the equities between investors and fare-payers, the Court of Appeals, as Judge MacKinnon pointed out in dissent, considered factors that apply equally to all utilities. *Id.*, at App. 100a. That the Court of Appeals' holding is not inextricably tied to the situation faced by this transit company—or by transit companies only—is further evidenced by the fact that the only precedents relied upon by the Court of Appeals involved non-transit utilities. *Id.*, at App. 17a-22a.

Furthermore, whether or not the Court of Appeals intended its holding to be narrowly focused, the impact of these cases inevitably extends much further. For however tied to these facts is its novel accounting rule, its application of an unlimited principle of retroactivity is not so anchored. By reaching back more than a decade and brushing aside numerous final administrative and judicial decrees in applying its new rule, the Court of Appeals has introduced a serious new element of uncertainty to utility financing. As

the American Gas Association stated in its *amicus curiae* brief, *supra*:

> * * * A rule which leaves matters of utility regulation to *ex post facto* determination on a case-by-case basis will have exactly the same effect on utility financing and capital structure as the most adverse decision which could be made in any case. Investors looking to the acquisition of utility company stock, whether of existing issues or in new financing, would realistically have to assume the most adverse decision before making an investment * * * . [*Id.*, at 2.]

There is nothing in the Court of Appeals' opinion that links this unlimited principle of retroactivity to the particular circumstances of this case. A prudent investor now must take into consideration, when contemplating a utility investment, that the financial statements upon which he relies are subject to judicial recalculation sometime in the unlimited future. That kind of uncertainty—by the inexorable laws of the market place—translates into higher costs for utility capital and credit at a time of an unprecedented need for those private funds. As the American Gas Association has stated, these decisions will have "significant adverse consequences for future public utility financing." *Amicus curiae* brief of American Gas Association, *supra*, at 2.

2. Respondent Black United Front also attempts to portray the Court of Appeals' holding as traceable to the conversion of Transit from a streetcar-bus system to an all-bus system, which conversion, it contends, was paid for by the farepayers and prompted the transfer of some of these properties to non-operating status. However, Respondent failed to point out that the Court of Appeals' holding applies as equally to property that is in no way related to the conversion program as it does to conversion-related property.

Thus, conversion can hardly be the factor that makes these facts in some way unique.

3. Respondent Democratic Central Committee has argued, in essence, that the Court should not review these cases because they are complicated and because, in some unspecified way, the issues raised by Petitioner cannot be dealt with without reference to other issues in other cases. "Memorandum of Democratic Central Committee," at 1, 3. The two cases for which Petitioner seeks a writ of certiorari were decided along with seven other cases involving Petitioner. Those other cases determined many other issues, some adverse to Petitioner, but none of which are involved here. The single, distinct, and precise issue raised by Petitioner—the Court of Appeals' treatment of appreciation on land—was not involved in those other cases. And it simply is misleading to imply *(id.,* at 3*)* that there is some mysterious but apparently essential information that is not revealed by the Court of Appeals' lengthy opinions in the cases in which review is sought.

4. Finally, we must re-stress the potential impact of these decisions below upon the current energy crisis. *See* Petition for a Writ of Certiorari, at 7-10. Since our petition was filed in December of last year, this crisis has deepened. Shortages have become more acute and the need for massive new private capital has become more obvious. It is even more true now than it was then that the decisions below constitute a threat to the investment of that capital, a threat that this country cannot afford at this time.

Respectfully submitted,

E. Barrett Prettyman, Jr.
Samuel R. Berger
815 Connecticut Ave., N.W.
Washington, D.C. 20006

Attorneys for Petitioner